SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

SAVE THE PARK, Petitioner, v. CALIFORNIA COASTAL COMMISSION and DOES 1-50, Inclusive, Respondents; Real Party in Interest Wayne Colmer.	Case No.: CV080410 RULING AND ORDER GRANTING PEREMPTORY WRIT OF MANDATE
BLACK HILL VILLAS, L.P., Intervenor, v. SAVE THE PARK, Defendant.	

I. INTRODUCTION AND SUMMARY

The City of Morro Bay is fortunate to have several biodiversity hotspots within its borders. Morro Bay State Park is a nationally recognized ecosystem. The Morro Bay estuary is considered the most important wetlands on the Central Coast of California,

containing coastal wetlands, tidal marshes, mud flats, freshwater marshes and related water bodies.

A sensitive and delicate balance exists between tidal flushing of Morro Bay and the nutrient-rich freshwater runoff, which can be easily disrupted. The California Coastal Act plays an important role in protecting against these and other disruptions. Any development occurring in the vicinity of Environmentally Sensitive Habitat Areas, frequently referred to as ESHAs, must be carefully reviewed and approved in a two-step process under the City of Morro Bay's Certified Local Coastal Plan.

One such proposed development is Black Hill Villas, a 17-unit residential project located on approximately 3 acres immediately adjacent to Morro Bay State Park. The site is especially problematic for development because it contains a variety of critical habitat including an important tributary of the estuary, a riparian corridor, suspected wetlands, and foraging territory for nesting raptors. Construction will entail significant disruption of on-site habitats, including stripping or grubbing more than 70% of the property and grading nearly 7,000 cubic yards of soil to create adequate sites for houses.

In 2007 the City of Morro Bay approved Black Hills Villas. In 2008, the California Coastal Commission ("Commission") likewise approved construction of the Villas, but only after attaching a series of protective measures designed to minimize the harm.

In 2008 a local environmental group known as Save the Park filed suit to set aside the Commission's decision, alleging that the development, even with protective measures, would disrupt and disturb the Environmentally Sensitive Habitat Areas located on the property, most notably wetlands and riparian areas.

A court's role in a suit like this one is limited. So long as there is evidence to support the Commission's decision, and so long as a court can logically follow the agency's decision path, it defers to the Commission's expertise in regulating development in the coastal zone. Some of the issues raised here can be resolved with

reference to this deference because the evidence and the Commission's decision making process are readily discerned.

In one fundamental area, however, the Commission's decision is inscrutable. Under the law, the Commission is obligated to know precisely what type of Environmentally Sensitive Habitat Areas are at issue and where they are located before giving its approval to any development nearby. The Commission's own findings with respect to Black Hills Villas prove that the biological surveys undertaken by the project proponent were inadequate to this task. Biological techniques that could have been utilized to precisely establish the type of ESHA and its boundaries were not utilized, and questions about the location of sensitive habitats that could have been definitively answered were not answered, but instead left for decision after approval was granted. This calls into question the validity of the entire process, which was, after all, to determine the minimum level of protection necessary (known as buffers) to preserve, protect, and enhance these specific types of valuable natural resources. Stated another way, without such knowledge, all development on the property will presumptively disrupt and disturb the ESHAs.

Given its own findings, the Commission should have required the project applicant to undertake necessary biological studies to precisely indentify which categories of ESHA were affected and to delineate their boundaries *before* any development on the site was approved. And those boundaries should have been clearly described and graphically set forth in the record. So far as the Court can tell, none of this occurred.

Judicial review of the Commission's decision is not a hollow formality. Under the law, the agency's decision must be transparent, readily understood, and supported by the evidence. That is not the case here. Accordingly, a writ of mandate will be issued directing the Commission to revoke its project approval until appropriate studies are undertaken, adequate ESHA boundaries are determined, and adequate findings are articulated in the record.

II. PROCEDURAL HISTORY

The California Coastal Act of 1976, Public Resources Code section 30000 *et seq*., commonly known as the Coastal Act, is a comprehensive statute designed to govern land use planning for the entire coastal zone of California. The goals of the Act are to protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone resources taking into account the social and economic needs of the state.

The Coastal Act requires affected local governments to prepare a Local Coastal Plan (LCP) for coastal zones within their jurisdictions. (Pub. Resources Code, § 30500, subd.(a).) The LCP can include land use plans, zoning ordinances, and other mechanisms to protect sensitive coastal resource areas. (*Id.* at § 30108.6.)

Once the Coastal Commission (a state agency created pursuant to the Coastal Act) has certified an LCP as being consistent with that statute, the local government is responsible for issuing coastal development permits in accordance with the LCP. (*Id.* at § 30519 subd.(a) and § 30600.)

In 2005, real-party-in-interest Wayne Colmer ("Colmer") and intervenor Black Hill Villas, L.P. ("Black Hill")(collectively "Developers"), filed an application with the City of Morro Bay ("City") to develop a 3.17 acre parcel owned by Black Hill.

On November 13, 2006, the City approved the project, which involves the removal of two existing structures and the subdivision of two existing parcels into 16 two-story single-family residences, a 2-story duplex residential lot, and a common area ("Project").

Certain local government approvals are subject to an appeal to the Commission. (Pub. Resources Code, § 30603.) When a project is appealed to the Commission, the hearing involves a two-step process. The Commission first determines whether the appeal presents a substantial issue for its review. (*Id.* at § 30625, subd. (b).) If it finds the project raises a substantial issue, the Commission conducts a de novo review of the

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project to determine whether the project conforms to the LCP standards and the public access policies of the Coastal Act. (*Id.* at § 30603, subd. (b.)

The City's approval of the Project was appealed to the Commission by Commissioners Caldwell and Schallenberger, and neighbors Roger Ewing and Ray McKelligott. These appellants asserted that the approval of the Project was inconsistent with various provisions of the City's LCP and the Coastal Act, including policies specifically designed to protect Environmentally Sensitive Habitat Areas.

On November 16, 2007, a hearing was held before the Commission to determine if a substantial issue existed that required a *de novo* hearing by the Commission. The Commission found a substantial issue, and decided to hold another hearing as to whether a permit for the Project should issue. (000910)

The staff report for the March 6, 2008 *de novo* hearing recommended that the Commission approve the Project with the following relevant conditions: (1) a minimum development setback of 100 feet for all components of the proposed development as measured from the top of the stream bank, except for the minimum area to allow site access; (2) avoidance of the raptor grove; (3) a 40-foot structural set back from the Black Hill Natural Area; (4) restoration of the stream and its buffer area as compensatory mitigation for removed vegetation and the roadway encroachment; and (5) a 14-foot height limit for residences (000914)

On April 11, 2008, the Commission adopted revised findings and conditions reflecting its March 6, 2008 approval. The Commission's approval of the Project was conditioned on a 50-foot stream setback, a 40-foot Black Hill Natural Area setback, a 25-foot height limitation, protection of most of the raptor habitat and riparian enhancement/replanting. (001310)

Save the Park took issue with the Commission's decision, and filed a writ of mandate against that agency, as well as the Developers, under Public Resources Code section 30801 and Code of Civil Procedure section 1094.5. Save the Park asserts the Commission violated a series of policies designed to protect Environmentally Sensitive

Habitat Areas, that the Project does not protect against significant disruption of the habitat values, and that the Commission violated policies regarding scenic and visual qualities.

The Developers and the Commission oppose the petition on procedural and substantive grounds. They claim that Save the Park lacks standing and failed to exhaust its administrative remedies. They emphasize that the Commission's interpretation of the LCP is afforded broad deference, and that substantial evidence supports the Commission's determinations.

III. DISCUSSION

A. Procedural Issues

The Developers first allege that Save the Park does not have standing as an "aggrieved party" to seek judicial review. Pursuant to Public Resource Code §30801, an "aggrieved party" is any person, or their representative, who appears at a public hearing in connection with a Commission's decision that was appealed.

An association's standing is dependent on whether: (1) its members would otherwise have standing to sue in their own right; (2) the interests or group it seeks to protect are germane to the organization's purpose; and (3) the claim asserted or the relief requested requires the participation of individual members in the lawsuit. (*Property Owners of Whispering Palm, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673) Save the Park and its members satisfy the associational standing test articulated in *Whispering Palm.*

The Developers next urge that Save the Park's failure to answer Black Hill's complaint-in-intervention resulted in a default. If a defendant fails to answer a complaint after a demurrer is overruled, a default may be entered. [CCP §472a, 586(a)(2); *see* CRC 3.1320(g)]. However, Black Hill intervened *as a real party interest.* "If the intervenor has intervened solely as a defendant, joining the original defendant in resisting plaintiff's claims, the complaint in intervention is, in effect, considered to be an answer, and its allegations are considered controverted; the original

parties need not file any pleadings in response. (citations)" (CEB, *Civil Procedure Before Trial, Fourth Ed.*, §31.54) Save the Park cannot be defaulted in this situation.

The Commission asserts that Save the Park failed to exhaust administrative remedies as to several issues, including the contentions that: (1) the claimed wetland and riparian areas were not mapped; (2) the downward adjustment of the ESHA buffer was done without consultation with Fish & Game; and, (3) the Commission did not take into consideration the "junk fill" on the Project site.[1]

The Court of Appeal recently discussed exhaustion of administrative remedies in *Center for Biological Diversity v. County of San Bernardino* (2010) 184 Cal. App. 4th 1342 (Fourth Dist., filed May 25, 2010). As discussed in that case, a petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. *Id*. *See Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.

As required, Save the Park has cited portions of the administrative record showing that the boundaries of the wetland, stream and riparian habitat areas were squarely before the Commission during the proceedings. *See, e.g.,* appeal form by petitioners contending that the Project will not protect but instead significantly degrade Environmentally Sensitive Habitat Areas (000532); response letter by Colmer responding to petitioners' appeal concerning protection of Environmentally Sensitive Habitat Areas, buffer areas and wetlands mapping (000753).

Further, the initial staff report acknowledges petitioners' contentions that:

> [t]he project approved by the City of Morro Bay is inconsistent with the ESHA protection, stream buffer, and visual resource policies of the certified LCP. Specifically, the Appellants assert that the City-approved project does not conform to certified Land Use Plan (LUP) Policies 11.01, 11.02 and 11.14 (ESHA Protection and Stream Buffer), which

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1 At the January 8, 2010 hearing, Save the Park conceded that it is not contesting the approval of the Project based upon any issues with "junk fill" or flood plain. This issue will not be further discussed.

prohibit any significant disruption to environmentally sensitive areas and establishes a minimum stream buffer of 100 ft. in rural areas. (000554)(emphasis added).

The record discloses that the location of Environmentally Sensitive Habitat Areas and the need to protect those areas by creating buffer zones in accordance with the LCP was a significant issue during the administrative process.[2]

Similarly to *Center for Biological Diversity v. County of San Bernardino*, *supra*, the Commission asserts that Save the Park did not adequately raise the issue regarding the precise location of wetland and riparian areas, or the failure to consult with Fish & Game. Yet, courts recognize that citizens who object during an administrative process should not be held to the same degree of specificity as in a judicial proceeding, because they are often not represented by counsel. *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176-177. And, it is not necessary for petitioners to identify the precise statute or regulations "so long as the agency is apprised of the relevant facts and issues." *Center for Biological Diversity v. County of San Bernardino, supra*; *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264.

Equally as important, Save the Park's contentions regarding wetlands mapping, and the failure to precisely delineate wetlands and riparian areas under LUP Policies 11.05 and 11.22, are part of the group's overarching contention that Environmentally Sensitive Habitat Areas were "degraded" and not adequately "protected against any significant disruption of habitat values."

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2 For example, the Revised, Adopted Findings make multiple references to the importance of locating these environmentally sensitive habitats with precision, as well as the importance of protecting them. *See, e.g.,* AR pages 001310 through 001311 (coastal staff summary), 001313 through 001314 (development limitations and buffer zones), 001317 (stream habitat area and buffer restoration and enhancement plan), 001323through 001325 (discussing applicable LUP policies, including precise location and designation of environmentally sensitive habitat areas), 001326 (discussing presence of wetland indicator species and inadequacy of current mapping), 001329 (discussing presence of ESHA/stream/wetland area along the stream channel), 001330 (discussing minimum one hundred-foot buffer for wetlands).

In order to adequately protect ESHA habitats under the LUP, the Commission must know the specific types of ESHA and their precise boundaries. These issues are inextricably intertwined, and they were sufficiently raised during the administrative process, along with the contention that the Commission failure to consult with the Department of Fish and Game.[3] To suggest that the Commission was unaware of, or not on notice of, the importance of conducting precise, accurate and lawful boundary determinations of wetland and riparian areas in conjunction with Department of Fish and Game consultation, is to overlook the totality of the record.

The Commission "was apprised of the relevant facts and issues, and the purpose of the exhaustion doctrine was satisfied without the citation of [additional regulatory] provisions during the administrative proceedings." *Center for Biological Diversity v. County of San Bernardino, supra*. *See, e.g., San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 24 Cal.App.4th 713, 735 n. 10; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3rd 692, 734 n.13.

B. Substantive Issues

1. Standard of Review

Courts review Commission decisions under the deferential "substantial evidence" standard. *Alberstone v. California Coastal Com.* (2008) 169 Cal.App.4th 859, 862. Under CCP §1094.5(b), the related question is whether the Commission proceeded in the manner required by law, and whether the final revised findings are adequate "to bridge the analytic gap between the raw evidence and ultimate decision" and to show the "analytic route the administrative agency traveled from evidence to action." *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, *(EPIC*); *Reddell v. California*

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3 While Save the Park did not, in so many words, point out the failure to consult with the Department of Fish and Game, there were extended discussions at several public hearings regarding the proper set back buffer for the stream area, including requirements mandated by policy 11.06, which contains the consultation requirement.

Commission (2009) 180 Cal.App.4th 956, 970; *Great Oaks Water Co. v. Santa Clara Valley Water Dist*. (2009) 170 Cal.App.4th 956, 970-971.

2. The Commission did not require the Developers to identify all ESHAs and to locate their precise boundaries prior to Project approval, and as a consequence failed to protect against significant disruption and degradation of those areas

As set forth in its Coastal Land Use Plan regarding Environmentally Sensitive Habitat Areas:

> The City of Morro Bay is fortunate to have many unique environmental habitat areas within and immediately adjacent to the community. Besides providing a unique setting for the City, there are critical habitat areas for several rare and endangered plant and animal species.
>
> The [Coastal Act] requires that the biological productivity and quality of coastal waters, streams, wetlands and estuaries be maintained, and where feasible, restored. (000709)

There are three specific types of ESHA that are defined and protected under Morro Bay's plan, including "wetlands" (000713), "streams" (000713), and "riparian habitat" (000714). The Commission staff provided an excellent summary regarding the importance of riparian habitat, which could be said of other ESHA as well:

> Maintaining and restoring riparian habitat along creeks, streams and rivers is critical to reversing biodiversity in California . . . . While less than 10% of California's historic riparian areas remain, those that do are biodiversity hotspots. Although riparian ecosystems generally occupy small areas on the landscape, they are usually more diverse and have more plants and animals than adjacent upland areas.
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> In the western United States, riparian areas compromise less than 1% of the land area, but are among the most diverse, productive and valuable natural resource. Watercourses are known to service important quarters for wildlife migration and dispersal. And waterways are also important

> dispersal corridors for plant propagules, not to mention the important function of delivering sediments and nutrients. Climate change experts predict that maintaining wildlife corridors and avoiding habitat fragmentation will grow in importance along the California coast in coming years as species range limits extend her contract to global warming. (000844 - 000845)

Morro Bay's Coastal Land Use Plan has 23 specific policies devoted to the protection of these Environmentally Sensitive Habitat Areas. The policies most pertinent to the current dispute are as follows (with emphasis noted in italics):

> **Policy 11.01** Environmentally sensitive habitat area shall be protected against significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.
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> **Policy 11.02** Development in areas adjacent to environmentally sensitive habitat areas . . . shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall maintain the habitats' functional capacity.
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> **Policy 11.05** Prior to the issuance of a coastal development permit, all projects . . . having the potential to affect an environmentally sensitive habitat area must be found to be in conformity with the applicable habitat protection policies of the Land Use Plan. *All development plans, grading plans, etc. shall show the precise location of the habitat(s) potentially affected by a proposed project . . . . In areas of the City were sensitive habitats are suspected to exist but are not presently mapped or identified in the City's Land Use Plan, projects shall undergo an initial environmental impact assessment to determine whether or not these habitats exist. Where such habitats are found to exist, they shall be included in the City's environmentally sensitive habitat mapping included within the LUP.*

Policy 11.06 Buffering setback areas a minimum of 100 feet from sensitive habitat area shall be required. *For other than wetland habitats*, if subdivision parcels would render the subdivided partial unusable for its designated use, the setback area may be adjusted downward only to a point where the designated uses accommodated but in no case is the buffer to be less than 50 feet. *The lesser setback shall be established in consultation with the Department of Fish and Game. If this setback area is adjusted downward, mitigation measures developed in consultation with the Department of Fish and Game shall be implemented.*

Policy 11.14 A minimum buffer strip along all streams shall be required as follows: (1) a minimum buffer strip of 100 feet in rural areas; (2) a minimum buffer strip of 50 feet in urban areas. . . .

Policy 11.18 New subdivisions shall be prohibited in areas designated as environmentally sensitive habitat areas. New subdivisions proposed adjacent to wetland areas shall not be approved unless the to-be-created parcels contain building sites entirely outside the maximum applicable buffer (i.e., 100 feet for wetlands and rural streams, and 50 feet for urban streams).

Policy 11.22 *The precise location and thus boundary line of environmentally sensitive habitat areas shall be determined* based upon a field study paid for by the applicants and performed by the City or City's consultants and approved by the City Council and/or their appointed designee *prior to the approval of development on the site* . . . . (000721-000725)

Even a cursory review of these provisions shows that identifying the ESHAs and defining their precise boundaries are critical to the successful implementation of Morro Bay's Coastal Land Use Plan. Yet the Commission findings nowhere make reference to these boundary location requirements, nowhere define the specific boundaries of the

riparian areas, and nowhere explain the Commission's rationale for concluding that the Project site contains no wetlands.

These failures of explanation are troubling given that the staff made specific and repeated references to possible presence of wetlands and riparian ESHA on the site. For example, during the *de novo* hearing, Staff Specialist Watson testified that: "Wetland indicator species are also present in the stream corridor area." (001096) Later in the hearing, Senior Director Lester testified "on the question of the riparian/ESHA setbacks" and pointed out that "staff has analyzed that resource, and identified it both as a qualifying stream under the LCP, but also as ESHA, and that includes a review of the materials by Dr. Engel, and regardless of your conclusions about how the LCP would distinguish urban and rural areas, the LCP does require 100 foot setback for ESHA . . . . (001131). Still later, Director Lester pointed out the two rationales for the 100-foot buffer. One is a "rural riparian setback," but the second rationale is "ESHA, which is an independent requirement for a 100-foot setback." (001136 - 00137)

In support of the Project's approval after the hearing was completed, the Commission issued Revised and Approved Findings (Findings), which conclude that the proposed project includes development adjacent to the "ESHA/stream/**wetland**/riparian habitat on the northern portion of the site." (001329, emphasis added). These same Findings go on to point out that the property has significant indicia showing the presence of environmentally sensitive wetland habitat in unknown locations:

> ***The biotic survey prepared for the project did not map the existing vegetation and similarly did not give the location of soil samples taken from this site. However, at least half of the soil samples taken resulted in positive identification of hydric soils—a wetland indicator. Furthermore, salt grass (Distichils spicata), a wetland species, was identified in the area adjacent to the stream along with several other non-native plants that have wetland plants status. In other words, and***

is often typical of stream and riparian areas, the on-site stream area also displays wetland characteristics, though the precise boundary of the wetland in this sense has not to date been mapped.

(001326)(emphasis added).

Given these findings, the Court cannot comprehend why the project applicant was not required by the Commission to undertake appropriate studies to precisely delineate the types of ESHA and their boundaries as required by Land Use Policies 11.05 and 11.22. As stated, this requirement is not academic ---- it goes to the heart of the process employed by the Commission to determine the minimum level of protection necessary for different types of ESHA, as well as the minimum size of the buffer areas that are necessary under the LCP.

Throughout its analysis, the Commission staff discusses development buffers, and levels of habitat protection, in terms of the minimum footage necessary to protect ESHA. As to the so-called stream area, for example, the Commission found that a 50-foot buffer was sufficient to protect against adverse impacts. (001333) Yet how the Commission established the minimum required setback, without also knowing whether the stream areas were merely "stream" habitats, or instead "wetland," and\or "riparian" habitats (which require different sorts of protection), is missing from the record. As a consequence, the Court cannot determine whether the Commission was justified in downwardly adjusting ESHA protection in a manner not applicable to wetland habitats and without the required review and comment by the Department of Fish and Game**.** *See* Policy 11.06 at 000722.[4]

The Commission claims that, when confronted with the LCP definitions for both stream and wetland ESHA, the agency *explicitly* found a definition for stream ESHA to

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4 It appears that the primary driver for allowing development within 100 feet of the stream bed was limited site access, which is claimed to be feasible only off of South Bay Boulevard where the existing access point is located. The Commission approved construction within the 100 feet buffer zone because it concluded that the development would not otherwise be feasible. However, the buffer zone can be downwardly adjusted only if certain specific conditions are met and certain types of ESHA are present. As stated, there is an insufficient record upon which the Court can gauge the legality of the Commission's downward adjustment here.

be the policy applicable to the subject property (1325). However, the Commission's citation to the administrative record is unsupported. Indeed, there is no evidence that the Commission made any such explicit conclusion. Further, the Developer-consultant's request for a wetland regulatory determination letter, and the Army Corps of Engineers' response (00783 through 00786), merely discuss a proposed new entrance to the development and not the entire property. These snippets hardly show any sort of analytical route, and they are *explicitly contradicted by the Commission's own revised and adopted findings, which also point out the inadequacy of the biological surveys performed by the Developer's biological consultant*.[5]

In supplemental briefing and at the second oral argument, the Commission also urged that it had no jurisdiction to amend the Morro Bay LCP map to expand the range of protected ESHA. This assertion is irrelevant in light of the Commission's admission that it indeed has the authority and obligation to delineate and protect ESHA when it reviews the issuance of coastal development permits in Morro Bay under Land Use policies 11.22 and 11.05. (*See* Attorney General's letter brief filed March 23, 2010 at p.2) The Commission did not adequately delineate or protect ESHA during its review process in this case.

Moreover, when a Land Use Plan defines ESHA to include areas that may later be identified as ESHA through the biological review process, the Commission has authority to delineate ESHA during a coastal development appeal. (*LT-WR, LLC, v. California Coastal Com.* (2007) 152 Cal.App.4th 770, 793.) The Morro Bay LCP contains just this sort of language in Policy 11.05, which the court of appeal discussed as follows: "Therefore, under the controlling LUP, the fact the subject property was not mapped as ESHA does not preclude it from being designated as an ESHA, provided it meets the appropriate criteria for such designation. (*Id*.)

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5 At the second oral argument on April 1, 2010, the Commission's counsel suggested that the multiple references to wetlands and wetland characteristics in the adopted findings were a case of "sloppy draftsmanship." However, there is no evidence to support this contention. In any event, "sloppy draftsmanship" makes meaningful judicial review far more difficult.

In its recent *EPIC* decision, 44 Cal.4th at 459, the California Supreme Court observed that, although an agency's findings under Code of Civil Procedure section 1094.5 need not be extensive or detailed, the administrative record must inform the reviewing courts of the theory upon which an agency arrived at its ultimate finding and decision. Mere conclusory findings, without reference to the record, are inadequate. Although an agency's findings sometimes pass muster when they generally refer to the administrative record, the court must have "no trouble under the circumstances discerning 'the analytic route the administrative agency traveled from evidence to action'. (*Id. at* 519.)

In its adopted findings the Commission concludes that "the low-lying intermittent stream and associated wetland/riparian habitat are ESHA" and that, "in sum, the subject site includes an ESHA/stream/wetland area along the stream channel along its northern boundary." (001329). Given the admitted presence of wetland and riparian habitat, the inadequacy of existing biological studies, the stated presence of wetland indicator species, as well as the Commission's failure to precisely delineate wetland and riparian boundaries, how the Commission chose to apply the ESHA/stream definition, as opposed to the wetland and/or riparian definition, remains a mystery. The Court concludes that that there is a fundamental gap in the Commission's reasoning, such that the Court cannot discern the analytic route the agency traveled from evidence to action.

Moreover, the Commission relied on the applicant's riparian enhancement plan to identify and presumably "map" the location of the riparian area. This was tantamount to putting the cart before the horse, as policy 11.22 requires the precise ESHA areas, including riparian areas, be located and approved by the City *prior to approval* of the Project.[6]

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6 Exhibit 6 falls woefully short of providing the "precise location," "boundary line," or "map" of ESHAs required by Land Use Policies 11.05 (000721) and 11.22 (000725). Instead, the Commission chose to postpone precise mapping until *after* the Project was approved. As stated, this is not allowed under the LUP/LCP.

The analytic route the Commission traveled from evidence to action is absent. *Compare Topanga Assn.,* 11 Cal.3d at 515; *EPIC,* 44 Cal.4th at 516-517; *Great Oaks Water Co.,* 170 Cal.App.4th at 970-971; *Reddell,* 180 Cal.App.4th 956, 970; *Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 557. The Commission did not proceed in a manner required by law, and there is a fundamental gap in the agency's reasoning process, both of which demonstrate a prejudicial abuse of agency discretion.

3. The Commission failed to consult with the Department of Fish and Game as required by the LCP provisions regarding ESHA downward adjustments

Save the Park's argument relative to the Department of Fish and Game consultation requirement is closely related to the ESHA boundary determination issue. Briefly, if the Commission chooses to adjust the stream or riparian ESHA setback downward, it must consult with the Department of Fish and Game under Policy 11.06 before doing so.

The Commission claims that the administrative record contains substantial evidence showing that the Department of Fish and Game would not object to a downward adjustment of the buffer. However, the only information in the record from the Department of Fish and Game consists of two form letters confirming that the Project will not directly affect two specific threatened species.

There is no substantial evidence that the Department of Fish and Game was consulted regarding the Commission's decision to downwardly adjust the minimum ESHA setbacks. The analytical route is again missing. *Compare Topanga Assn.,* 11 Cal.3d at 515; *EPIC,* 44 Cal.4th at 516-517; *Great Oaks Water Co.,* 170 Cal.App.4th at 970-971; *Reddell,* 180 Cal.App.4th 956, 970; *Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 557. The Commission did not proceed in a manner required by law, and there is a fundamental gap in the agency's reasoning process, both of which demonstrate a prejudicial abuse of agency discretion.

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4. The Commission appropriately required the applicant to comply with the City of Morro Bay's Black Hill Natural Area protection standards

The parties agree, and the administrative record bears out, that the western side of the Project abuts the Black Hill Natural Area wildlands. Save the Park contends that the entire Black Hill Natural Area is categorically designated as ESHA, which requires a minimum 100-foot buffer under the LCP, and that the Commission erred by allowing less than the minimum. The Commission argues that the 40-foot buffer was appropriate because only the upper portion of Black Hill Natural Area is categorically defined and mapped as ESHA.

In its adopted findings, the Commission concludes that: (1) only the upper portion of the Black Hill Natural Area is categorically identified and mapped as ESHA (001328; *see also* Figure 28 of the LCP; (2) there do not appear to be any sensitive plant or animal species directly adjacent to the Project (001328); (3) there is no specific buffer distance for park and recreation lands specifically prescribed by the LCP (001333); (4) development adjacent to park and recreation lands must be sited and designed to prevent impacts that would significantly degrade such areas (001333); (5) the Black Hill Natural Area is "predominately ESHA" (001334); and, (6) a 40-foot buffer would provide adequate separation to ensure protection of the adjacent park land (001334).

Given the adopted findings, as well as the record evidence supporting those findings, the Court can discern the analytic route the agency traveled from evidence to action.[7] *Topanga Assn.*, 11 Cal.3d at 515; *EPIC,* 44 Cal.4th at 516-517; *Great Oaks Water Co.*, 170 Cal.App.4th at 970-971; *Reddell*, 180 Cal.App.4th 956, 970; *Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 557. There is substantial

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7 The staff's initial report acknowledges that this area requires protection by the use of buffers to avoid direct impacts (000577), including fire safety buffers. Although the LCP does not specify any minimum buffers for fire safety (000578), the staff noted that the State of California recently adopted revised findings requiring a 100-foot setback for fire protection along wildland inferface areas. (000579) The staff also referenced the fact that the Black Hill Natural Area is "predominately ESHA" and has been designed to be left in an undisturbed state in order to function as wildlands. (000580) Although the Commission staff recommended a minimum buffer of 100 feet, the Commission was free to disagree, so long as the analytical route of disagreement was evident.

evidence supporting the Commission's determination that the Black Hill Natural Area is not categorically considered ESHA, and that the area immediately adjacent to the Project is not in fact ESHA. The Court concludes that the Commission's approval of a 40-foot buffer did not violate the LCP.

5. The Commission appropriately required the applicant to comply with the City of Morro Bay's Scenic viewshed protection standards

The Commission determined that the Project is located in a significant public viewshed. Under LCP policies 12.01, 12.02, and 12.06, scenic and visual qualities must therefore be protected. (001339) Save the Park generally contends that the Commission's approval violated these policies.

As originally approved by Morro Bay, the adjacent mobile home park would have screened the lower levels of the proposed two story residences, but not the upper levels, which would still have been visible in the public viewshed. In approving the Project, however, the Commission limited the height of the new residences to 25-feet above grade, and required them to be constructed in such a way as not to be visible from Highway 1, which would include the use of screening trees, vegetation and earth tone hues. (001340)

Given the specific special conditions to ensure compliance with LCP policies 12.01, 12.02, and 12.06, the Court can discern the analytic route the agency traveled from evidence to action. *Topanga Assn.*, 11 Cal.3d at 515; *EPIC*, 44 Cal.4th at 516-517; *Great Oaks Water Co.*, 170 Cal.App.4th at 970-971; *Reddell*, 180 Cal.App.4th 956, 970; *Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 557. There is substantial evidence supporting the Commission's determination that the scenic and visual qualities of the significant public viewshed will be protected under LCP policies 12.01, 12.02, and 12.06.

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IV. CONCLUSION

Save the Park's petition for administrative mandamus is granted in part. Accordingly, a writ of mandate will be issued directing the Coastal Commission to revoke its project approval, and to undertake any further proceedings in a manner consistent with this Ruling and Order.

The Court encourages the parties to reach agreement on the form of the Writ of Mandate and Judgment and to submit them for signature as soon as possible.

If agreement cannot be reached, on or before July 9, 2010, counsel for petitioner shall file and serve the proposed Writ of Mandate and proposed Judgment. Any objections (as to form only) shall be filed and served on or before July 16, 2010. If disagreements remain, they will be considered at a hearing on July 22, 2010. No further argument on the merits will be entertained.

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DATED: June 21, 2010

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CHARLES S. CRANDALL
Judge of the Superior Court

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